

KNOWING THE ELEPHANT: DISTINGUISHING PROPERTY RIGHTS ON THE OVERLAND TRAIL

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INTRODUCTION

Scholars of American legal history generally ignore the western frontier.¹ What little work has been done concentrates upon one theme: the frontier's impact on the development of law.² The impact of law on the westward movement is seldom considered.³ One explanation is the difficulty of obtaining primary sources that are both reliable and available. It may be said with slight exaggeration that court records are the only evidence of frontier law that have attracted serious investigation.⁴ Overlooked as an area of potentially fruitful study have been the hundreds of diaries, letters, memoirs, and reminiscences written by the men and women who participated in one of the west's most exciting epochs—the overland trail to California and Oregon.

Believing themselves on the verge of a great adventure, emigrants who went to see the elephant⁵ recorded their experiences so they might be shared with their families, grandchildren, and friends. Their diaries, letters, and memoirs amount to an avalanche of primary sources.⁶ Daily observations were entered into private journals of scenery, events, and human behavior. There may be no better material extant for exploring the question of whether

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1 For a recent citation of the available sources see, Bakken, *Contract Law in the Rockies, 1850-1912*, 18 AM. J. LEGAL HIST. 33 (1974).

2. E.g., Note, *Jurisprudence: The Law and the American Frontier*, 38 U.M.K.C. L. REV. 432 (1970).

3. Notable among the few studies is F. PHILBRICK, *RISE OF THE WEST* 350-60 (1965).

4. See, e.g.: Blume, *Criminal Procedure on the American Frontier*, 57 MICH. L. REV. 195 (1958); Blume, *Civil Procedure on the American Frontier*, 56 MICH. L. REV. 161 (1957); W. HAMILTON, *ANGLO-AMERICAN LAW ON THE FRONTIER: THOMAS RODNEY & HIS TERRITORIAL CASES* (1953).

5. "Seeing the elephant" was a popular expression of the 1840s. To overcome a great difficulty was to "see the elephant," and traveling on the overland trail was "seeing the elephant." *TRAIL TO CALIFORNIA: THE OVERLAND JOURNAL OF VINCENT GEIGER AND WAKEMAN BRYARLY* 187 n.1 (D. Potter ed. 1945) [hereinafter cited as *OVERLAND JOURNAL*].

6. M. MATTES, *THE GREAT PLATTE RIVER ROAD* 24-29 (1969).

Americans carried their law with them onto the frontier or whether law was reshaped to fit the frontier environment.

COMPANY PROPERTY

The most revealing indicator of the attitudes of nineteenth century Americans with respect to the law in general is probably their attitudes toward property rights. Respect for and appreciation of ownership interests is as accurate a test as we are likely to find for measuring thoughts about law obedience held by average people. A more subtle test is whether they understood legal principles governing the acquisition, control, and disposition of property and were able to apply those principles to resolve disputes and avoid potential conflicts.⁷ Most revealing of all would be to learn whether pioneers on the frontier could distinguish between various types of ownership, keep the rights associated with different kinds of interests in property separate and distinct during negotiations, and conduct their affairs with confidence, knowing that those with whom they dealt were applying the same legal definitions and conforming to the same legal principles.

There were three main types of property-holding on the overland trail—private property, partnership property, and company property. The word “company” was loosely used by the emigrants. Sometimes it referred to joint-stock companies to which each member contributed equal amounts of capital. Wagons, draft animals, and other property purchased by such a company were held concurrently, belonging to the entire organization.⁸ Other times the term “company” meant a group journeying together, either informally or organized under a set of popularly-adopted rules, or even a constitution.⁹ In the parlance of the overland trail, a “traveling company” usually did not own common property. If it did, emigrants were as apt to use the term “partnership” as “company,” and as a rule the words “company” and “partnership” were synonymous.

7. The rights of partners in their jointly-owned property, for example, were perhaps the legal issue that arose most frequently on the overland trail.

8. See, e.g., *Constitution of the Charlestown [West] Virginia, Mining Company*, printed in *OVERLAND JOURNAL*, *supra* note 5, at 213-22.

9. Many companies formed on the frontier created elaborate governments with officers, by-laws, judges, and juries. See, e.g., *Constitution and By-Laws of the Green and Jersey County Company*, printed in E. PAGE, *WAGONS WEST: A STORY OF THE OREGON TRAIL* 336-41 (1903). For a constitution drafted and adopted after the trip had begun, see Letter from Peter H. Burnett to James G. Bennett (Jan. 18, 1844) printed in *THE FRONTIER EXPERIENCE: READINGS IN THE TRANS-MISSISSIPPI* 97-98 (R. Hine & E. Bingham eds. 1963).

"Quite a number of persons are selling their interests in companys [sic] and returning to the States," an emigrant noted in his diary during 1849.¹⁰ He could have meant a joint-stock company or a partnership, but chances are he did not mean a traveling company.

Loose words do not imply loose concepts. Where distinctions were meaningful, the emigrants drew them. It was recognized and clearly understood that ownership of property was the factor that distinguished different types of companies. Eight men from Ohio had arrived at the Missouri River already organized as the Fort Stephenson Mining Association. On the plains they joined eleven other men. The original eight owned some concurrent property, for Fort Stephenson was a joint-stock company. The larger group of nineteen did not own property as a unit. It was referred to as a "traveling company."¹¹ One Forty-Niner in another group was even able to distinguish between his joint-stock company, the traveling company with which the joint-stock company journeyed, and an individual who traveled with but was not a member of either group.¹² Ownership of property was the difference.¹³

10. C. Parke, Notes Crossing the Plains, entry for May 31, 1849 (ms., Huntington Library, San Marino, Cal.).

11. Note Book of John A. Johnson During his Voyage to & Residence in California, entry for July 30, 1849 (ms. Beinecke Library, Yale U.) [hereinafter cited as Johnson, Note Book].

12. At the South Pass three wagons were "all that belonged to our Joint Stock company." There was one other wagon "that had traveled from one day['s] travel t[h]is side of St Jo[seph] with us this making four waggons [sic] that belonged to our company." Diary of P. F. Castleman While Crossing the Plains to California, entry for July 19, 1849 (ms., Beinecke Library, Yale U.) [hereinafter cited as Castleman, Diary].

[T]his morning before breakfast a gentleman came in camp wet as he said he had just swam the river he was riding a government horse but was dressed in citizen dress so we suspected him for being a deserter which he did not deny but after we heard his pitty [sic] tale we told him he could get some thing to eat and could travel with us but that he could not join us as one of the company for we did not want any dif[f]iculty on his account.

Id., entry for June 27, 1849.

13. Thus, when they learned of shortages on the road and decided to abandon their wagons in order to travel faster, the two groups sold their surplus property separately. At the Humboldt River meadow (Lovelock, Nevada), they lay by two days

to sell or throw away every article of provision & other property not absolutely necessary to this journey into California. . . . I was left on the part of our company at the Slue [slough] with some coffee, bacon, & rice to sell & the rest pressed over to the river, Fox remaining with me to sell for their company & the Tiffin boys.

Johnson, Notebook entry for Aug. 2, 1849. Fox was one of the eleven men not a member of the Fort Stephenson Association. Apparently the eleven were divided into two property owning groups: the second company and the brothers named Tiffin.

Emigrants appreciated that a company owning property stood in relationship to that property very much as did an individual owning private property. It may even be that members of a company could contract debts that the company, as the property owner, would have to pay.¹⁴ In the reverse situation, if others damaged or destroyed company property, it was the company that was reimbursed.¹⁵

Most references to company property in the literature of the overland trail are related to dissolutions.¹⁶ Very few companies journeyed from the Missouri to the Sierras without either total division or drastic alterations in numbers or management. Many dissolved somewhere along the Platte River, and those that got to Fort Laramie intact usually collapsed at that halting place.¹⁷ Ironically, a major cause of dissension was disputes over the very thing that should have united them: the company property.¹⁸

14. Such is implied from a story told about a Sunday religious service. The preacher gathered "a respectable crowd" but

[b]efore he got through the dismissal [sic] a hard hail storm came up and scattered the good folks, we had our tent filled with ladies from all parts of the country. . . . I had placed my biscuit and jerked buffalo meat in the tent, they soon found it out and that was the last of it, their company however repaid its loss.

Letters and Journal of Henry Atkinson Stine on his Overland Trip from St. Louis to Sacramento, entry for July 14, 1850 (typescript, Cal. State Library, Sacramento, Cal.).

15. "Layed by to go back after our boat . . . and some of the emigrants cut the boat up and spoilt it we caught some one at it and made them pay for it ten dollars." J. Compton, Diary, entry for June 10, 1853 (ms. Bancroft Library, U. of Cal.).

16. A typical entry would read: "Crosley and Burrows and Co[mpany] divided their provision[s]." Diary of William Johnston, Huntingdon, Pa., 1852, entry for May 13, 1852 at 2 (typescript, Cal. State Library, Sacramento, Cal.).

17. The principal place of division was Fort Laramie.

18. Conversely, when the property was of a nature not easily divided, concurrent ownership might be a factor preventing dissolution. An example is the Granite State and California Trading and Mining Company, one of the few joint-stock organizations to reach California intact. It "would have been dissolved before it reached California had it not been for the beef cattle. . . . They were their principle [sic] dependence for food, and it was not practical to divide them among small squads." *Quoted in OVERLAND JOURNAL, supra* note 5, at 39. By the same token, common property made it difficult to expel members. One lawyer who headed a company in which the members were bound to him by personal contract, paid a man \$20 to leave: "He is a lazy, fractious thievous fellow unworthy [of] the confidence of any man. I am glad he is gone & so are all." W. Blake, Journal, entry for June 29, 1852 (ms., Wis. State Historical Soc'y, Madison, Wis.). "He got homesick & the Co[mpany] generally did not like him, so I gave him \$20 & he went his way rejoicing." Letter from Winslow Blake to wife and children (July 21, 1852) (ms., Wis. State Historical Soc'y, Madison, Wis.). That same year at Salt Lake City, another man leaving a com-

PRIVATE PROPERTY WITHIN COMPANIES

Addison Crane from Indiana was traveling up the North Platte River toward the Mormon ferry at today's Casper, Wyoming, when an event occurred that he later recorded into his diary:

Mr. Merriweather (one of our Co.) gave me a sack of flour to day (100 lbs) he having more than they could use. He would take no pay for it—quite generous, as it could have been sold for \$12. to \$15. I believe however it is considered out of character for any one to *sell* any provisions to any person in the same train, but if he has any [left] over it is considered common property.¹⁹

It is odd that Crane made so mistaken a guess about wagon-trail law. As both a lawyer and judge, he should have known better.²⁰ Moreover, what he called "our Co.[mpany]" was not a joint-stock organization with members pledged to assist one another throughout the trip, but rather a loose collection of carts and wagons whose owners had little in common except that they were traveling together. There was no elected leadership, no popularly-promulgated rules, no mutual contracts, and no concurrent property. Yet Crane supposed that mere companionship was sufficient to convert surplus private property into concurrent property or transfer title from the over-supplied to the needy. No other extant diary provides so much as a hint that such a legal principle existed.

In one of the best organized and most tightly-run joint-stock companies to cross the plains during 1849, there was no such rule. "One member of the Company," the captain wrote in his diary, "of-fered another \$5 for a flour biscuit, & [was] refused."²¹ That incident took place at a time of acute shortage on the overland trail, and the Washington City Company was on Lassen's cutoff in northern California, the spur of the road where the largest numbers experienced the greatest suffering. Two days later the same

pany received \$40 to settle accounts. *California Experiences of William R. Rowe, Sr.: Account of Trip to California in 1852*, at 14 (typescript, Wis. State Historical Soc'y, Madison, Wis.).

19. A. Crane, *Journal of a Trip Across the Plains in 1852*, entry for June 13, 1852 (ms., Huntington Library, San Marino, Cal.). See also H. EATON, *THE OVERLAND TRAIL TO CALIFORNIA IN 1852*, at 152 (1974) [hereinafter cited as *EATON, OVERLAND TRAIL*].

20. Crane had been a judge in Indiana and was to become a judge in California. Crane, *Memoir Written by Himself*, in M. WOOD, *HISTORY OF ALAMEDA COUNTY, CALIFORNIA* 865-69 (1883).

21. *1 GOLD RUSH: THE JOURNALS, DRAWINGS, AND OTHER PAPERS OF J. GOLDSBOROUGH BRUFF* 232 (G. Read & R. Gaines eds. 1944) [hereinafter cited as *GOLD RUSH*].

captain recorded that "certain men and messes in the company had purchased flour, and were well provisioned, but most of the men had scarcely sufficient to take them in [to the settlements]." ²² These emigrants had traveled as a paramilitary organization from the District of Columbia to California, intending to mine together and then divide all profits into equal shares. If any group had a custom of demand rights upon the excess goods of companions, we would expect it to be them. They did not, however; what they owned as individuals was as absolutely private as was any property protected by police and courts east of the Missouri River. Even in times of famine, there was no common granary.

The evidence, clear and unambiguous, indicates there was no item of private property that its owner had to share with his company. Even water could be husbanded for exclusive, personal use. A company of forty-two men and eleven wagons reached the Green River in western Wyoming after crossing a long desert. Some teams arrived in better condition than did others. "I had the precaution," one member explained, "to fill our water cast this morning, which gave our mules each an advantage of water over the rest of the train." ²³

Horses and mules were the most frequently mentioned kinds of private property held by persons who were members of companies. Next to food, nothing was so prized or as valuable as a riding animal. Just because a man belonged to the same company as you gave him no right to take your horse. ²⁴ If borrowed, horses had to be returned, ²⁵ and few owners were willing to see their property worn down to keep the company moving. ²⁶ Private interest was equal, perhaps superior, to public interest.

22. *Id.* at 236.

23. Dr. T., *Journal of his Experiences Crossing the Plains in 1849*, entry for June 20, 1849 (ms., Bancroft Library, U. of Cal.) [hereinafter cited as Dr. T.].

24. A young man of the company, as reckless as unprincipled, backed by several scoundrels, attempted this morning to take my horse, prompt determination frustrated them.—The recollection of their parents stayed my hand, as I was on the eve of making a bloody example.—Glad that I checked myself.

GOLD RUSH, *supra* note 21, at 183.

25. Two men in a company of forty-two lost their horses on the Platte. "[O]ne of the Horses belonged to our mess and had on the saddle a splendid pair of Holster pistols—We borrowed 2 Horses and started them back in pursuit with directions not to return until they had found them." Dr. T., *supra* note 23, entry for May 22, 1849.

26. Two draft horses pulling a mess' wagon became weak and had to be rested. The result was that one member "grumbles because he has to put his horses on [the] heavy wagon." N. Cagwin, *Diary*, entry for May 29, 1850 (ms., Cal. State Library, Sacramento, Cal.).

During the famous migration of 1841, in which the first train of American settlers crossed the Sierras and entered California, the wagons were abandoned in the Western regions of today's Utah.²⁷ Going down the Humboldt River, at least half of the party was on foot.²⁸ Almost out of food (their few remaining oxen were the only available source²⁹), "a portion of the company who had the best horses, about nine of them, parted from the others, and said they were going to travel faster, and get in before they became exhausted."³⁰ Taking advantage of their stronger private property, they departed, leaving the less well-supplied behind at the Sink of Humboldt.³¹

Eight years later, along the same river, Oliver Goldsmith and a messmate were able to leave the slow-moving Wolverine Rangers in part because they had "our faithful Indian ponies."³² Had other members of the Wolverine Rangers lost their cattle to the local Diggers or to poison water, they would have had no claim on the horses of Goldsmith and his friend. Company losses fell on all,³³ but private losses were not shared.³⁴

27. J. BIDWELL, ECHOES OF THE PAST ABOUT CALIFORNIA 45 (M. Quaife ed. 1928) [hereinafter cited as BIDWELL, ECHOES].

28. *Id.* at 52.

29. *Id.* at 54.

30. J. Belden, Statement of Historical Facts on California 10 (ms., Bancroft Library, U. of Cal.).

31. John Bidwell says that they killed an ox that morning for breakfast:

When nearly ready to go, the captain [Bartleson] and one or two of his mess came to us and said: "Boys, our animals are much better than yours, and we always get out of meat before any of the rest of you. Let us have the most meat this time and we will pay you back the next ox we kill." We gladly let them have all they wished. But as soon as they had taken it and were mounted ready to start, the captain in a loud voice exclaimed: "Now we have been found fault with long enough, and we are going to California. If you can keep up with us, all right; if you cannot, you may go to _____"; and away they started, the captain and eight men. One of the men would not go with the captain; he said: "The captain is wrong, and I will stay with you boys."

BIDWELL, ECHOES, *supra* note 27, at 54-55.

32. O. GOLDSMITH, OVERLAND IN FORTY-NINE: THE RECOLLECTIONS OF A WOLVERINE RANGER AFTER A LAPSE OF FORTY-SEVEN YEARS 57 (1896) [hereinafter cited as GOLDSMITH, OVERLAND].

33. Some companies provided for the loss of private property, at least if the members remained together: "Article 7th. If any of this company should lose his team we feel ourselves bound to take such persons through to California." Constitution of the Wisconsin Blues Organized 8 May 1850 (copy, Beinecke Library, Yale U.).

34. A leader of the Donner migration, James Frazier Reed, lost cattle in the desert, which perhaps were taken by Indians:

We remained here [at Pilot Peak] for days hunting cattle, some of the party finding all, others a portion, all having enough to haul their wagons except myself. . . . I now gave up all hope of

THE TRANSMUTATION OF PROPERTY

All available evidence leads to an inescapable conclusion: emigrants on the overland trail had no difficulty understanding and utilizing the legal concept that within a single company some wagons were concurrently owned, while others were private property. When mentioning such arrangements to others, they saw no need to explain what was meant.³⁵ They also understood the consequences of investing personal funds in concurrent property. "I had not a dollar in the world," one Forty-Niner wrote on leaving his company without reimbursement. "I knew the property that we had was joint stock and I had nothing that was my individual property but my clothes blankets &c. so I selected a few of the best and two blankets and struck out on foot."³⁶

Legal complications did not cause confusion or lead to a blurring of potentially conflicting interests. Just as there were men who owned nothing but concurrent claims in company property, so others owned nothing at all whether privately or concurrently.³⁷ In between stood men who were not members of a particular organization, yet had a claim on some, but not all, of its property. During May of 1849, for example, a traveling company from Illinois attached itself to a larger group called the Peoria Pioneers. The pioneers owned a boat big enough to carry a loaded wagon "over any stream."³⁸ To increase the size of the train, "they admitted other teams by each person paying \$3 which makes us joint owners in the boat and 3 yoke of oxen that draw it."³⁹ The purchasers

finding them and turned my attention to making arrangements for proceeding on my journey. In the desert were my eight [actually three] wagons; all the team remaining was an ox and a cow. There was no alternative but to leave everything but provisions, bedding and clothing. These were placed in the wagon that had been used for my family. . . . I had now to make arrangement for sufficient team to haul that one wagon; one of the company kindly loaned me a yoke of cattle, and with the ox and cow I had, made two yoke.

1 OVERLAND IN 1846: DIARIES AND LETTERS OF THE CALIFORNIA-OREGON TRAIL 437 n.51 (D. Morgan ed. 1963).

35. See e.g., Letter from Charles G. Moxley to Emily Moxley (May 24, 1849) (ms., Beinecke Library, Yale U.).

36. Castleman, Diary, *supra* note 12, entry for Oct. 23, 1849.

37. One arrangement was for a man to obtain "his passage by contributing something to the outfit and working his way through. There were quite a number in this class, they having no property rights in the train." G. COLE, IN THE EARLY DAYS ALONG THE OVERLAND TRAIL IN NEBRASKA TERRITORY, IN 1852, 47-48 (1905).

38. Letter from Epaphroditus Wells to Emma B. Wells (May 27, 1849) (typescript, Bancroft Library, U. of Cal.).

39. *Id.*

apparently did not think the arrangement complicated or unusual. They held private or partnership rights in their wagons, stock, and provisions, and, together with the Peoria Pioneers, concurrent rights in the boat and the team hauling it. They did not, however, consider themselves members of that joint-stock company and knew they had no claim on its property except for the boat and three yoke of oxen.

Our story may be more remarkable than we think. The legal sophistication of the average layman is but part of the tale. What cannot be overlooked is that social pressures undermining traditional concepts were surely great on the overland trail—there was no police force or permanency of association; strangers passed never expecting to meet again; travelers were stalked by fear of hunger, fear of exposure, and fear of being left behind. Yet if we search the records, there is but one indication that the emigrants may have departed from common law. Furthermore, that departure, involving the possible alteration of company property into private property by prescriptive use, may underline rather than disprove the theory that behavior was determined by remembered rules.

In a few companies, draft and saddle animals were truly held in common, their use depending on need or rotation.⁴⁰ In most, however, they were assigned to individuals or to wagons either by lottery or direction of the elected captain.⁴¹ In companies where mules were used in common, they usually were sold when the company disbanded or were given to individual members as private property.⁴² But where a mule was exclusively ridden by one person, there came a time when it may have been considered the property of that person.⁴³

40. "We have 17 horses in our company which we take turns in riding." *Western Reserve Chronicle* (Warren, Ohio), Aug. 22, 1849, at 1, col. 6.

41. *E.g.*, GOLDSMITH, *OVERLAND*, *supra* note 32, at 14.

42. Near Bidwell's Bar on Feather River, a joint-stock company of Boston and New Hampshire men voted to dissolve. "This morning the mules were brought in, and one given to each member of the company, leaving seven miserable beings that were distributed by lot." A. Batchelder, *Journal of a Tour Across the Continent of N. America . . . in 1849*, entry for Oct. 18, 1849 at 153 (ms., Bancroft Library, U. of Cal.).

43. A fact that might occur even in proprietorship trains in which the men traveling in messes were hired hands working their way over the trail. One such man owned only "one double blanket, a gun, ammunition, and some clothes." He did not buy a mule but rode two while herding cattle belonging to his employer. Near Goose Creek in today's northeastern Nevada, he "commenced to drive an ox team, having to take the place of another man, as the roads were very rough; the man was driving cattle with my mules, which the Captain of the train took away from him and

As a case in point, consider a packing company that drew its mules from a common pool. We might expect the members to have the same experience during the trip, but the strength and endurance of each animal created differences between individuals, much as if they owned the animals as private property. The luck of the draw determined how the journey went. A good animal made progress easier, as one member noted on crossing the Forty-Mile desert:⁴⁴ "[T]he last 7 or 8 miles is sandy & heavy: as soon as Tylers mule reached this Sand he gave out so far that he had to get off & lead him: the same was the case with two or three others. My mule unexpectedly carried me through."⁴⁵ The writer is not as specific as we might like, but little can be made of his words except that the common mules had either been assigned as personalty or became so by exclusive use.

A REPRESENTATIVE CASE

It would have been better for us had nineteenth century Americans traveling the overland trail to the Pacific been less familiar with the various methods of owning property. Had diarists not taken legal concepts for granted, they might have told us more of their ideas and how they defined terms. Robert Beeching, for example, was a Forty-Niner who went to the gold fields of California via the southwestern trail through Texas, New Mexico, and Arizona. He was a member of a New York joint-stock company that purchased and held all of the wagons and oxen. Before starting on the long stretch of wilderness between San Antonio and El Paso, Beeching "purchased an excellent Horse . . . w[h]ich I propose taking to California useing [sic] him as my own."⁴⁶ That remark, "as my own," was as close as any emigrant came to explaining the distinction between methods of holding property. Beeching recognized at least two types of ownership existing within his train: concurrent property in the wagons and cattle belonging to the company, and personal property possessed by himself in the horse.⁴⁷

he had to walk." P. Murphy, *Across the Plains in the Year 1854*, entry for Aug. 16, 1854, at 9 (typescript, Cal. State Library, Sacramento, Cal.).

44. Via the route to the Truckee River.

45. Johnson, Note Book, *supra* note 11, entry for Aug. 3-4, 1849.

46. Journal of R. Beeching, entry for May 22, 1849 (ms., Huntington Library, San Marino, Cal.).

47. A month and a half out on the trail, before reaching El Paso, Beeching, a director of the joint-stock company, had good reason to make the distinction:

Indians had crept into camp & stolen from our company 3 Mules & 4 Horses together with 15 others belonging to private individuals in our's & other companys; at the present price of animals our

Charles Gray, another Forty-Niner from New York,⁴⁸ distinguished between four types of property while crossing to California. He was with a joint-stock company that took the more famous and far more crowded northern route up the Platte and down the Humboldt Rivers.⁴⁹ On the evening of the day that the train left Independence and crossed the Missouri, Gray slept in "the common stock wagon." That was the first type of ownership identified—concurrent ownership—or as Gray described it, "the common property of the Co."⁵⁰

The second type was partnership property which, like the private property Beeching purchased in Texas, was a saddle animal. Gray found the overland trail fatiguing. Apparently he was unused to physical hardship, and the trip proved unexpectedly demanding. Within a week, Gray attempted to buy a horse from passing Indians.⁵¹ Failing that, on the twentieth day out, he and at least one other man purchased a horse for \$70 from a messmate.⁵² That horse was partnership property.⁵³

The partnership did not last very long. A little over a month later Gray regretted having "sold my share in our horse some few weeks ago."⁵⁴ Because the best ox had died and the remainder were jaded, he was "obliged . . . to walk all the time."⁵⁵ It was more

company will sustain a loss of some \$500 a sorry thing for us indeed, especially under existing circumstances.

Beeching was especially pleased "that our mess camped by themselves the Night the theft was com[m]it[t]ed or we might have losed [sic] our animals with the others." *Id.*, entry for July 13, 1849.

48. Gray was the brother of Henry Peters Gray, son of a New York merchant who grew up in New York City and in upstate New York. Downes, *Henry Peters Gray*, 7 D.A.B. 517 (1931).

49. It is evident the company was a joint-stock enterprise. Goods purchased in New York had been shipped ahead to California, a common practice among joint-stock companies planning to mine together. C. Gray, *An Overland Passage from Independence Mo. to San Francisco, Cal.* in 1849, entry for Aug. 20, 1849 (ms., Huntington Library, San Marino, Cal.) [hereinafter cited as *Gray, Overland Passage*]. Gray also referred to "the common stock wagon" as company property. *Id.*, entry for May 10, 1849.

50. *Id.*, entry for May 1, 1849. See also *id.*, entry for May 13, 1849.

51. "Tried to buy a horse from them for \$25—but couldn't get him." *Id.*, entry for May 7, 1849.

52. *Id.*, entry for May 22, 1849. Other members of the mess owned individual property: "The mare belonging to one of our mess presented us with an addition to our family, so he remain[e]d with her, whilst the train moved on." *Id.*, entry for Sept. 11, 1849.

53. Gray did not indicate the exact arrangements. All he said was that he owned a share. *Id.*, entry for June 30, 1849. As it was purchased from a member of his mess, it could not have been a mess partnership.

54. *Id.*, entry for June 30, 1849.

55. *Id.*

physical exertion than his constitution could tolerate.⁵⁶ At Jim Bridger's trading post in the southwest corner of present-day Wyoming, Gray bought another animal. "I found the constant walking had made my feet so sore," he complained, "that I should be obliged to have a horse at all hazards & was compell[ed] to pay \$81 for an old, broken down horse & saddle, but our folks think he will recruit."⁵⁷ This horse and saddle were private property.

Charles Gray soon learned that private property, far from solving his problems, actually compounded them. The responsibility and risk connected with exclusive ownership of a horse could be a heavy burden for a New Yorker on the overland trail. "I found him too much trouble to take care of," the city-bred man wrote, "& also some what dangerous to take along as he may break his leg or my neck, or be stolen by the Indians."⁵⁸ At Salt Lake City, Gray traded the horse and saddle purchased from Bridger for a yoke of oxen. Although now attached to the mess wagon, the property was still private, and Gray benefited from his ownership in two ways. First, by permitting his companions to use the animals, he was able to "ride all the time"⁵⁹ in the wagon, a safer and more comfortable way to travel than jogging on a horse.⁶⁰ Second, Gray was speculating, hoping to turn a profit and earn some pocket money. The oxen were "powerful & large, too much so in fact, as I am somewhat fearful of their getting through, however if the emigrants on the Fort Hall road don't want them & at a good profit to me also then I'm mistaken very much."⁶¹ He succeeded in trading them, but incurred a loss.⁶²

The new oxen, though better than the former yoke, did not make Gray happy for he did not want to own them in fee. He

56. *E.g.*, nine days before:

A very heavy sandy road all day. . . . I walked all day behind the train, driving a yoke of lame cattle: never did I remember wishing more earnestly for night (quite as bad as Wellington at Waterloo!) which came at last, but tired, worn & fatigued. . . . The sun to day came down with great power.

Id., entry for June 21, 1849.

57. *Id.*, entry for July 7, 1849.

58. *Id.*, entry for July 16, 1849.

59. *Id.*

60. Gray too was not always completely comfortable: "[T]he dust [is] excessively annoying . . . & as I ride nearly all the time in the wagon I get the worst of it." *Id.*, entry for July 27, 1849.

61. *Id.*, entry for July 16, 1849. Gray had left the Fort Hall or Oregon road to travel to Fort Bridger and Salt Lake City. He would rejoin it in eastern Nevada, near today's city of Wells. Gray actually made his trade the day he left Salt Lake City.

62. "Traded off my large oxen for a smaller pair by giving \$10 to boot, & now feel confident of getting through safely." *Id.*, entry for July 19, 1849.

would have preferred they were held in a fourth type of ownership—not as company, partnership, or private but as what emigrants called “mess” property. “My mess,” Gray complained, “who have all along refused to buy a yoke with me, permit me however to invest \$100 for their benefit, which I consider as perfectly mean & contemptable [sic].”⁶³

The remaining oxen drawing the wagon in yoke with Gray’s pair were mess property. In fact, Gray had purchased his animals to replace an ox that had died of alkaline poisoning just beyond Devil’s Gate. “He belonged to my mess,” Gray explained.⁶⁴ Later, in the Sierras, some “Indians eluded the guards & seized 11 head of cattle.” Gray apparently did not have any of his private stock taken—“as the devil would have it they seem[e]d to have selected the best”—but that did not mean he was unaffected. “[O]ur mess looses [sic] two,” he lamented.⁶⁵

The mess owned other property. Brandy is an item we know about because one afternoon some of Gray’s messmates treated the general traveling company to a spree,⁶⁶ much to his annoyance.⁶⁷ What else was possessed as mess property is not indicated in Gray’s journal. We may, however, be certain there were some items of value, for when the New Yorkers reached California it was necessary to settle two different sets of accounts. One was mess business, the other company affairs. In fact, Gray negotiated transactions for three different categories of property. First he sold his privately-held animals for substantially less than he had paid for

63. *Id.*

64. *Id.*, entry for July 26, 1849. He had attempted to purchase oxen at both South Pass and Fort Bridger. *Id.*, entries for 28 June & 7 July 1849.

65. *Id.*, entry for Sept. 8, 1849. The cattle were recovered, apparently because they were too wild for the Indians to handle. The raiders were probably Pit River Indians who wanted the oxen for meat. Down in Texas, Indians were not looking for food. Mules and horses had been taken from Beeching’s company, while oxen were ignored. Journal of R. Beeching, *supra* note 46, entry for July 13, 1849.

66. “One of our mess this afternoon with very ill judged liberality took out our brandy demijohn & about half the camp got in a spree, all being in first rate humor.” Gray, *Overland Passage*, *supra* note 49, entry for July 9, 1849.

67. Gray had his own use for the brandy. Due to “violent attacks” of “rheumatism,” he suffered much pain. His “*only remedy*,” one he employed several times while keeping his diary, was “a large dose of brandy [which] put me in a comparatively insensible state, thereby giving me a little comfort.” *Id.*, entry for June 10, 1849. When sick, he “[p]ass[e]d a tolerable night by the aid of a lot of whiskey.” *Id.*, entry for Aug. 4, 1849. “This brandy,” he lamented on the day the camp drank it, “is certainly the best ‘pain extractor’ extant.” *Id.*, entry for July 9, 1849.

them,⁶⁸ underlining the word "my" when recording the transaction as if to emphasize the fact he had sold his own property.⁶⁹ That same day Gray disposed of "the common stock wagon & its impliments [sic] for \$250 (about one third of its cost)."⁷⁰ The next morning he negotiated an agreement settling mess ownership. "Drew up an article of dissolution between our mess & all signed it," Gray wrote, giving us no specifics but making it clear that mess property and mess business was not mixed with company property or company business.⁷¹ The affairs of the larger, joint-stock company were more complicated. Gray himself was next day "busy a long time in making out the shares & dividing the gold dust which we received for our common stock wagon & tools & apportioning it among so many made a long & delicate job of it."⁷²

When that task was completed, Charles Gray and the men with whom he had traversed the overland trail no longer held shares in company property or mess property.⁷³ There was only private property and, if any two or more men now negotiated agreements to work together in the mines, there may also have been partnership property.

CONCLUSION

When the Forty-Niners and those who followed them over the California trail arrived in the gold diggings of the Sierras, they abandoned many common law rules of property and formulated a new customary law for ownership of precious metals found on public lands.⁷⁴ It was a feat they could not have accomplished on the

68. He received \$85 for three oxen, two of which he had purchased in Salt Lake City for \$110. His company had come by way of Lassen's Cut Off, into California from the north. Had they gone by Placerville the animals would have sold for much more. Those arriving early got high prices—\$1,200 for a wagon and six mules delivered to Sacramento. Diary of Jasper Morris Hixson May 1-August 6, 1849, entry for Aug. 4, 1849 (typescript, Cal. Historical Soc'y, San Francisco, Cal.).

69. Gray, *Overland Passage*, *supra* note 49, entry for Oct. 7, 1849.

70. *Id.*

71. *Id.*, entry for Oct. 8, 1849.

72. *Id.*, entry for Oct. 9, 1849.

73. That is, they held no shares in the items brought overland. The goods shipped from New York to San Francisco were still held concurrently and had to be divided, sold, or abandoned before affairs were fully settled. A high percentage of joint-stock companies had ceased to function at this point; the men scattered throughout the diggings, and property was left to rot on San Francisco beaches.

74. McCurdy, *Stephen J. Field and Public Land Law Development in California, 1850-1866: A Case Study of Judicial Resource Allocation in Nineteenth-Century America*, 10 *LAW & SOC'Y REV.* 236-53 (1976); J. DAVIS, *HISTORICAL SKETCH OF THE MINING LAW IN CALIFORNIA* 10-24 & 32-34 (1902);

overland trail. Custom is the product of precedent and can control the conduct of a sedentary but not a peripatetic people.

It was for the very reason they were constantly on the move that the emigrants who crossed the continent during the 1840s and 1850s represent a unique historical experience. We must resist the temptation to compare them to other groups and ask why they did not spin a more *sui generis* course. We may admit that like merchant seamen they were a floating population, separated from social roots, and apprehensive of facing some of nature's most fearful perils. But even a mariner who changed ships at every port could anticipate encountering familiar customary behavior aboard each vessel and sharing a common profession with the men with whom he was in contact. The overland emigrant was trudging a path he might never walk again, for which he had no preparation, and in company with people with whom he shared little except language, nationality, some common background,⁷⁵ and law. They met, associated, broke up, and passed on down the trail, never to meet again. These were not the conditions permitting action to become habit, habit to become usage, usage to become custom, and custom to become law.

The emigrants did not have the time to let the new evolve from the old. They could not be guided by the custom of the trail for there was no such custom. They had little choice but to do what they in fact did do. They turned to the law of the eastern states, the law they thought they had left on the banks of the Missouri River but which they had, in truth, carried with them across the plains, over the mountains, and onto the desert.

G. YALE, LEGAL TITLES TO MINING CLAIMS AND WATER RIGHTS IN CALIFORNIA 58-70 (1867).

75. For a brief discussion of the social and economic background of the emigrants see Goodrich & Davidson, *The Wage-Earner in the Western Movement*, in 1 PIVOTAL INTERPRETATION OF AMERICAN HISTORY 115, 154 n.2 (C. Delger ed. 1966). Also, most were Protestants and many belonged to fraternal organizations such as the Odd Fellows. Yager, *Diary of a Journey Across the Plains: Part Two*, 13 NEV. HIST. SOC'Y Q. 19, 38 n.53 (1970).